Rule 7, Ariz. R. Crim. P.

BAIL AND BOND — There is no general Federal constitutional right to bail; the United States Constitution provides only that if bail *is* allowed, it must not be excessive. However, there is a federal statutory right to bail in most cases Revised 12/2009

Article 2, § 22 of the Arizona Constitution provides a State constitutional right to bail in most cases. However, there is no corresponding Federal constitutional right to bail. The Eighth Amendment to the United States Constitution provides only that "Excessive bail shall not be required;" it does not provide any general right to bail. In *Carlson v. Landon*, 342 U.S. 524, 545 (1952), the United States Supreme Court explained:

> The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept.

Noting that "the very language of the Amendment fails to say all arrests must be bailable," the Court held that bail need not be allowed in all cases. *Id. at* 546. In particular, *Carlson* held that bail need not be allowed in deportation cases. See also *Kelly v. Springett*, 527 F.2d 1090, 1093 (9th Cir. 1975): **"**Although an accused has a Fourteenth Amendment due process right to have a state's bail system administered without caprice or discrimination, he has no absolute right to bail.**"** *See also State v. Norcross*, 26 Ariz. App. 115, 117, 546 P.2d 840, 842 (App. 1976), stating, **"**there is no federal constitutional right to bail, it is only that 'excessive bail shall not be required," *citing and quoting Rendel v. Mummert*, 106 Ariz. 233, 236, 474 P.2d 824, 826 (1970). In *Nowaczyk v. State of New Hampshire*, 882 F.Supp. 18 (D. N.H. 1995), the defendant

filed a habeas corpus petition in the federal district court claiming that the state court unconstitutionally denied him bail and later set excessive bail. The federal district court denied relief and held that the Eighth Amendment did not require the state court to grant bail. The court further held that the federal court could not substitute its opinion of an appropriate bail amount for the state court's determination of bail unless the state court acted arbitrarily in setting bail. *Nowaczyk*, 882 F.Supp. at 21.

Although there is no federal constitutional right to bail, the Bail Reform Act of 1984, 18 U.S.C. 3141 et seq., generally provide a statutory right to bail in non-capital federal court cases. In *United States v. Motamedi*, 767 F.2d 1403 (9th Cir. 1985), the Ninth Circuit considered the Bail Reform Act. The court noted that "federal law has traditionally provided that a person arrested for a noncapital offense shall be admitted to bail," and said that "Only in rare circumstances should release be denied." *Motamedi*, 767 F.2d at 1405. The court held that under that Act, the government bears the burden of showing by a preponderance of the evidence that the defendant is a flight risk and/or that he presents a danger if released. The court must then determine whether any conditions of release will reasonably assure the defendant's presence, considering the nature and circumstances of the offense, the weight of the evidence against the defendant, the defendant's history, his ties to the community, and other factors. The appellate court reviews the district court's factual findings and will not overturn those findings, absent a showing that the lower court's factual findings are "clearly erroneous." *Motamedi*, 767 F.2d at 1405-06. In *Motamedi* the Ninth Circuit granted relief, holding that the trial court gave undue weight to the charges against the defendant and failed to

consider factors showing that he was not a flight risk. *Id. at* 1408.

A federal court will grant habeas corpus relief on a claim that a state court has imposed an excessive bond amount only if the state court acted arbitrarily in setting that amount. In *United States ex rel. Savitz v. Gallagher*, 800 F.Supp. 228 (E.D. Pa. 1992), the district court upheld the state court's order setting $3 million bail for a defendant with AIDS who was accused of multiple acts of sex with minors and other sex offenses. The state court said that if the defendant would voluntarily commit himself pending trial to a private, locked mental health facility where he would be separated from all other patients, the court would reduce his bail to $200,000. The defendant sought federal habeas relief arguing that the conditions of bail were unduly oppressive and unconstitutional and impossible to meet, claiming that no hospital would accept him under those conditions. "The test to be applied in adjudging the reasonableness of this condition is not whether he is able to meet the condition but rather if the condition is reasonable in light of the compelling interest of the Commonwealth when its courts reasonably found that Savitz presented a risk of future criminal conduct." *Savitz*, 800 F.Supp. at 233. In light of the state court's findings that the defendant had engaged in repetitive compulsive sexual behaviors over which he had no voluntary control, the state court did not act arbitrarily in finding that the defendant was likely to endanger others if released and that the release conditions were necessary to protect the public.